KENG SOON FINANCE BHD.

v.

M.K. RETNAM HOLDINGS SDN. BHD. & ANOR.

PRIVY COUNCIL
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD LOWRY
[PRIVY COUNCIL APPEAL NO. 2 OF 1986]
6 MARCH 1989

LAND LAW: *Charge to secure money lent - Non-payment of interest - Application for order for sale - Generation of intention - Section 256(3) of the National Land Code 1965 - Whether knowledge of sale contracts to purchasers can give rise to equity or establish a cause to the contrary - Whether relief under s. 256(3) can be refused if chargee is arrogant or boorish - Illegality - Breach by Housing Developers (Control & Licensing) Act 1966 and Rules.*

The 1st respondent was the registered proprietor of certain land in the Mukim of Ulu Kinta which had been divided into 59 lots upon each of which it was proposed to construct a dwelling-house. On 14 October 1978 the 1st respondent applied to the appellant for credit facilities to finance the development. At that time, majority of the plots had been sold to purchasers. After further correspondence, on 25 November 1978 the appellant wrote to the 1st respondent, a facility letter expressing its willingness to advance a total sum of RM600,000. Interest was to be at the rate of 11% with monthly rests. The loan was to be secured by a legal charge on the 59 lots. The terms were accepted. The charge which was duly registered on 8 February 1979 contained a covenant to pay interest at the prescribed rate on the last day of each month and a provision that in case of default the chargee should be entitled to give notice demanding immediate payment of the principal sum and accrued interest.

Between January 1979 and August 1980 the total sum advanced amounted to RM511,390.50. The 1st respondent was persistently in arrears with payments of interest under the charge. The appellant was reluctant to make further advances while the 1st respondent persisted in making default in making the interest payments due. The arrears were never in fact cleared.

On 15 September 1980 the appellant threatened legal action. On 27 June 1981 the appellant issued an originating summons for an order that the land be sold. The summons was heard on 25 August 1982 by Wan Hamzah J, who dismissed the appellant's application and gave leave to the 2nd respondent to intervene in the proceedings.

The appellant appealed against the dismissal of its application and that appeal was in turn dismissed on 4 August 1983. The appellant then appealed to the Privy Council.

Held:

[1] By virtue s. 55 of the Contracts Act 1950 and applying a common sense approach to the arrangements between the appellant and the 1st respondent and accepting that the facility letter and the charge can be read together, their Lordships rejected the proposition that the effect of the documents, was to impose on the mortgagee the continuing obligation to finance the payment to itself of the interest in arrear.

[2] That s. 256(3) of the National Land Code is mandatory. The Court shall order a sale unless to make one would be contrary to some rule of law or equity. The section cannot be extended to enable the Court to refuse relief simply because the Court feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

[3] The fact that the appellant had knowledge of the existing contracts of sale to purchasers at the date of the charge cannot confer any equity on the purchasers nor could it furnish a cause to the contrary for the purpose of s. 256 of the National Land Code.

[4] In respect of the 2nd respondent, leave was given to raise an entirely new point of illegality based on the breaches of s. 5(1) of the Housing Developers (Control & Licensing) Act 1966 and r. 12(1) of the Housing Developers (Control & Licensing) Rules 1970.

[Appeal against the 1st respondent allowed with costs. Appeal against the 2nd respondent referred to the Supreme Court for determination of the issue of illegality.]

[Editors' Note: Privy Council granted leave to 2nd respondent to defend the appeal as a poor person on 6 October 1988.]

Cases referred to:
Stavers v. Curling [1836] 3 Bing NC 355
United Marketing Co. v. Hasham Kara [1963] 1 WLR 523
Edler v. Auerbach [1950] 1 KB 359

Legislation referred to:
Housing Developers (Control and Licensing) Act 1966 (No. 38 of 1966), s. 5(1)
Contracts Act 1950, s. 55
National Land Code 1965, s. 253(1)

For the Appellant - Mr. William Stubbs Q.C; (Mr. Cecil Abraham with him)
For the 1st Respondent - Mr. W.S.W. Davidson
For the 2nd respondent - Mr. Hira Singh; (Mr. Peter Knox (English Bar), Miss Manprit Sangha and Mr. V. Kumar with him)

JUDGMENT

Lord Oliver of Aylmerton:

This is an appeal from an order dated 4 August 1983 of the Federal Court of Malaysia (Salleh Abas CJ, Mohd Azmi FJ and Syed Agil FJ) dismissing with costs the appellant's appeal from the refusal of the High Court on 25 August 1982 of an order for the sale of certain land of which the appellant was the chargee.

The first respondent was at all material times the registered proprietor of certain land in the Mukim of Ulu Kinta which had been divided into 59 lots upon each of which it was proposed to construct a dwelling-house. On 14 October 1978 the first respondent applied to the appellant for credit facilities to finance the continuation of the development. At that time the majority of the plots had been sold to purchasers under agreements for sale each of which provided for an initial deposit and stage payments as the building erected on the plot progressed and which contained the following two Clauses:

> 3. Subject to the provisions of Clause 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing this agreement.
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> 4. The land sold to the purchaser shall be free from any encumbrance immediately prior to the handing over of vacant possession of the building to the purchaser.

After the initial application, further correspondence ensued between the appellant and the first respondent and the appellant was furnished with a list of the purchasers. On 25 November 1978 the appellant wrote to the first respondent a facility letter expressing its willingness to advance a total sum of RM600,000, as to RM200,000 on presentation of a legal charge on the land and as to the balance in stages against architect's certificates. Interest was to be at the rate of 11% with monthly rests and was to be settled monthly. The loan was to be secured by a legal charge on the 59 lots and repayment was to be made "From the proceeds of sale of the houses built but not exceeding a period of two years from date of first release of loan. Amount required for the release of each title is RM10,200". These terms were accepted and on 27 January 1979 the first respondent charged the land to the appellant as security for the repayment of the sum to be advanced with interest at the agreed rate. The charge, which was duly registered on 8 February 1979, contained a covenant to pay interest at the prescribed rate on the last day of each month and a provision that in case of default the chargee should be entitled to give notice demanding immediate payment of the principal sum and accrued interest. Section 253(1) of the National Land Code provides:

> The provisions of this chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

Section 254 enables the chargee, where a breach has occurred of any agreement by the chargor and is continued for one month, to give a statutory notice requiring it to be remedied within one month. On default, the monies secured (if not already due) become due and payable and the chargee may apply to the Court for an order for sale. Section 256(3) provides that:

> On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

Between January 1979 and August 1980 some monies were advanced under the charge amounting to RM511,390.50 in the aggregate, but the first respondent, although it appears to have received stage payments from some at least of the purchasers of the individual lots, was persistently in arrears with payments of interest under the charge. The appellant (not, in their Lordships' view, unreasonably) was reluctant to make further advances while the first respondent persisted in making default in making the interest payments due. The arrears were never in fact cleared but the first respondent did from time to time and under pressure make payments on account and as such payments were made so further advances were made against architect's certificates. The last payment of any interest was made on 7 July 1980 and thereafter no further advances were released. On 15 September 1980 the appellant threatened legal action unless the arrears of interest were paid and on 27 October 1980 a letter was despatched to the first respondent threatening foreclosure. By the end of December 1980 arrears of interest amounted to over RM37,000. A proposal by the first respondent that a further advance of some RM52,000 against architect's certificates should be made on the first respondent's undertaking to pay RM20,000 of the arrears was declined and on 20 May 1981 the appellant served on the respondent a formal notice under s. 254 of the Code. On 27 June 1981 the appellant issued an originating summons for an order that the land be sold. At that date the outstanding amount (excluding interest accrued since the end of the previous month) was RM579,225.10.

The summons was heard on 25 August 1982 by Wan Hamzah J who dismissed the appellant's application and, at the same time, gave leave to the second respondent, who is a purchaser of one of the 59 lots and who has, it appears, made substantial progress payments to the first respondent, to intervene in the proceedings. Written reasons for the decision were given

by the Judge on 14 December 1982. The reasons given for dismissing the application were, first, that for reason which neither the Court of Appeal nor their Lordships have found it easy to understand, Clause 4 of the sale agreements to the purchasers of the individual plots rendered the charge invalid and, secondly, that the evidence disclosed an agreement by the appellant to extend the period of the loan notwithstanding the non-payment of interest.

The appellant appealed to the Federal Court against the dismissal of its application and that appeal was in turn dismissed on 4 August 1983 by the Federal Court, the judgment of the Court being delivered by Salleh Abas CJ. The Court found itself unable to agree with either of the reasons given by the Judge for dismissing the application but nevertheless upheld his decision on the three entirely different grounds. First, it was said that, since there was nothing in the terms of the facility letter which specifically provided that the release of advances against architect's certificates was to be conditional upon the first respondent keeping up the interest payments which it had undertaken to make, the appellant was itself in default in withholding the final advances requested and had thus itself brought about the breach of the first respondent's obligation. With respect to the Federal Court, their Lordships have found themselves unable to agree with this analysis. In *Stavers v. Curling* [1836] 3 Bing NC 355, Tindal CJ (at p. 368) stated the common law principle thus:

> ... the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way.

That principle is imported into Law of Malaysia by s. 55 of the Malaysia Contracts Act 1950. Applying a common sense approach to the arrangements between the appellant and the first respondent and accepting that the facility letter and the charge fall to be read together, their Lordships are unable to accept the proposition that the effect of these documents, when read together, is to impose on the mortgagee the continuing obligation to finance the payment to itself of interest in arrear. The charge contains a specific covenant for the payment of interest at the end of each month and a provision enabling the chargee to call in all outstanding monies in default is made in performing this obligation. Their Lordships find difficulty in seeing how it can successfully be argued that because, as a mater of indulgence, the chargee refrains from taking the extreme course of enforcing the security immediately, he comes under a continuing obligation to finance a chargor who is in default.

The second ground upon which the Federal Court concluded that no order should be made was that the appellant had behaved "unreasonably". Their Lordships can see no ground for this suggestion, which appears to rest on the failure of the appellant's solicitors to answer two letters and on a letter in which, they referred to a reference to the mislaying of some architect's certificates as a "red herring". Even if there were grounds for castigating this as offensive or discourteous (of which their Lordships are not convinced) it cannot possibly be a good ground for withholding an order for sale. Section 256(3) of the National Land Code is mandatory. The Court "shall" order a sale unless it is satisfied of the existence of "cause to the contrary". Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the Court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

The third ground for the Federal Court's decision was that the existence at the date of the charge to the knowledge of the appellant, of existing contracts for the sale to purchasers of individual lots constituted a "cause to the contrary". This seems, with respect, to ignore entirely the terms of Clause 3 of the sale agreement, assuming for the moment that clause is valid and effective as an authority by the purchasers to the vendor to charge the land - a matter to which their Lordships will have to revert. The Federal Court appear to have proceeded upon the footing that despite the authority which, assuming the validity of Clause 3, was voluntarily conferred by the purchasers on the first respondent and upon the faith of which the appellant advanced its money, there remained some equity in the purchaser to override the charge as against the chargee in the event of the vendor falling down on the obligation undertaken by him in Clause 4 of the agreement. Their Lordships can see no ground upon which such an equity could be claimed. Indeed, the express purpose of Clause 3 was to enable the vendor to create an effective charge. Moreover it has to be borne in mind that the appellant's charge was duty registered. Section 340 of the National Land Code provides (so far as material) as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

Even assuming - a point which does not arise in the instant case and has not been argued - that this section might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish a "cause to the contrary" for the purposes of s. 256.

Accordingly, if the disposal of the present appeal rested solely upon the grounds relied upon by the Federal Court, their Lordships would feel bound to advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed.

There is, however, a further point which has arisen during the course of the hearing before the Board. Mr. Hira Singh, who appears for the second respondent, the intervenor, has sought leave to amend his written case by raising an entirely new point of illegality. That arises in this way. By s. 5(1) of the Housing Developers (Control and Licensing) Act 1966 (No. 38 of 1966) it is provided that:

> No housing development shall be engaged in, carried out or undertaken except by a person, body of persons, company, firm or society who or which is in possession of a license issued under this Act.

To carry on a business of housing development without a license is a serious offence carrying, under s. 18 of the Act, a penalty of up to five years imprisonment or fine of up to RM20,000. By s. 4, the Minister may make rules (*inter alia*) prescribing the form of contract

to be used and regulating the conditions of any contract between a developer and his purchaser. In fact such rules have been made. The Housing Developers (Control and Licensing) Rules 1970 (which, their Lordships have been told, were in force at all times material to this appeal) prescribed (*inter alia*) terms which are compulsory in every contract of sale. Rule 12(1) provides:

> Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:
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> (b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser.

Two points arise out of this. In the first place, following the decision of the Federal Court, the second respondent commenced proceedings in the High Court against the first respondent for specific performance of the agreement for the sale of the lot which he had purchased. That action was successful and a decree was made which was subsequently upheld in the Supreme Court on 15 April 1985. It emerged in the course of the hearing, however, that the first respondent was in fact not a licensed housing developer. This was known to Mr. Hira Singh at the time when he settled the written case in the present appeal, for that starts with the statement "the first respondent is an unlicensed housing developer". The significance of that fact does not, however, seems to have been appreciated at the time and it was not until a few days before the hearing before the Board that there was delivered to the appellant a proposed amendment to the second respondent's printed case in which, for the first time, there was sought to be raised a question of illegality. What is sought to be said is that the sale agreement not only failed to include the mandatory Clause provided for in r. 12(1)(b) but in fact contained, in Clause 3, a provision which flatly contradicted it and which is unlawful and of no effect.

Their Lordships have not heard the appellant's submissions as to this, but *prima facie* there appears at least to be a strongly arguable ground for contending that a provision which seeks to circumvent the mandatory Clause by imposing on the purchaser a blanket approval upon the signature of the contract cannot be effective. Moreover, an unlicensed developer, who, *ex hypothesi*, is carrying on business unlawfully, certainly could not claim to be in a better position than a licensed developer. If this is right, then it would follow that the charge, in the absence of express approval by individual purchasers, was created by the first respondent without the authority of the purchasers, of whose interests, quite clearly, the appellant had express notice before the charge was entered into. Mr. Hira Singh wishes to argue - and their Lordships wish to stress that they formed no view as to the strength or weakness of the argument - that, having regard to the contravention of the rules, which is apparent on the face of the sale agreement, not only was the purported authority conferred on the first respondent to create charges binding on purchasers ineffective but the creation of the charge constituted a fraud on purchasers. These submissions, if correct, have important consequences as regards the defeasibility of the appellant's title to the charge having regard to the provisions of s. 340 of the National Land Code, consequences which may depend upon whether it can be established that the appellant had actual or constructive notice of the terms of the purchaser's agreements or of the fact that the first respondent was an unlicensed developer. If, for instance, the fact be that the appellant was aware of the unlicensed status of the first respondent, an obvious further and much more serious question arises as to how far a charge to secure monies loaned for the carrying on of an illegal undertaking could be enforceable at all and this would, of course, go to the very root of the transaction.

Their Lordships have been much concerned as to whether, at this very late stage, they should permit the new points which Mr. Hira Singh seeks to argue to be raised at all. Their Lordships' Board has always been extremely reluctant to permit the raising for the first time on an appeal of points which have not been previously raised and argued and on which their Lordships do not, therefore, have the benefit of the determination and reasoning of the Court from which the appeal comes (see, for instance, *United Marketing Co. v. Hashim Kara* [1963] 1 WLR 523). That must particularly apply where the point sought to be raised may depend upon the determination of facts not previously in issue and therefore not investigated in the Courts below and one which, as a point depending on the local law, falls particularly within the expertise of the local Courts. Very exceptional circumstances must be shown before this principle will be departed from. There are, however, two features of the instant case which, in their Lordships' view, justify treating it as such an exceptional case. In the first place, although the question of the validity of Clause 3 of the sale agreement and thus of the first respondent's ability to bind the interests of purchasers was one which could have been taken at a very much earlier stage in the appeal to their Lordships' Board, it has to be said in fairness to Mr. Hira Singh that the broader point of illegality stemming from the unlicensed nature of the first respondent's business was not one of which he could have reasonably been aware until after the decision of the Federal Court when the matter came to light, as their Lordships have been given to understand, as a result of an admission of the first respondent's director in the course of his cross-examination in the specific performance action. But, secondly, and more importantly, the point is a substantial one which raises directly the question of the legality of the charge. It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is appraised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see e.g., *Edler v. Auerbach* [1950] 1 KB 359) for clearly, no Court could knowingly be party to the enforcement of an unlawful agreement. In these circumstances, their Lordships have been persuaded that this is one of the very rare occasions upon which they should depart from their usual practice and permit Mr. Hira Singh to present his argument.

Mr. Stubbs, whilst quite properly resisting the point being taken at all, felt compelled to concede that, once taken, it could not be dismissed out of hand as insubstantial. He fairly pointed out, however, that he has had very little time to prepare to meet it, more particularly since it involves a close consideration of the provisions both of the Housing Developers (Control and Licensing) Act 1966 and of the National Land Code and of relevant Malaysian decisions as to the scope and effect of s. 340. Moreover, there is clearly a substantial issue of fact which may have a material bearing upon the matter and upon which neither Mr. Stubbs nor Mr. Davidson, for the first respondent, have any present instructions, as to the extent to which the appellant was aware or must be deemed to have been aware of the terms of the sale agreements and of the unlicensed nature of the first respondent's business. It does not appear to their Lordships, therefore, that the difficulty can be met simply by adjourning the matter in order to enable the parties to prepare further arguments, for there are substantial questions both of law and fact which are best determined and, as far as issues of fact are concerned, can only be determined by the Courts of Malaysia.

Their Lordships will, accordingly, advise His Majesty the Yang di-Pertuan Agong that the appeal from the decision of the Federal Court of 4 August 1983 should be allowed with costs to be paid by the first respondent in the High Court and the Federal Court and before the Board; that the order of the High Court dismissing the appellant's application be discharged; but that the originating summons should now be remitted to the Supreme Court for the

determination of all questions of fact and law arising out of the new points now taken on behalf of the second respondent. It would, in their Lordships' view, be right that the second respondent should be restricted to the points arising out of the rules and the unlicensed nature of the first respondent's business which have been canvassed before their Lordships and that the specific matters relied upon by the second respondent should be formally pleaded so that there can be no misunderstanding with regard to the issues of fact and law to be determined, but this is, of course, a matter entirely for the Supreme Court to determine, as is the question of whether there should be a further remission to the High Court of any issue of fact which falls to be determined.

Since the hearing before the Board their Lordships have been informed that the taxed costs of the second respondent which were ordered by the Federal Court to be paid by the appellant have in fact been paid. Whether in the light of their Lordships' advice all or any of such costs ought now to be ordered to be repaid is a matter for which no argument was addressed to their Lordships and, in their Lordships' view, it is a matter which is more appropriately dealt with by the Supreme Court at the conclusion of any further hearing.

Also found at [1989] 1 CLJ 897